IN THE HIGH COURT OF JUDICATURE

DATED: 19.10.2006

CORAM

THE HONOURABLE MR.JUSTICE P.D.DINAKARAN
and
THE HONOURABLE MR.JUSTICE M.THANIKACHALAM

Criminal Appeal No.1431 of 2004

Annamalai .. Appellant

Vs.

State by Sub Inspector of Police
Thiruppathur Taluk Police Station
Vellore District. .. Respondent

Appeal under Section 374 of Crl PC against the judgment dated 15.2.2002 made in S.C.No.175 of 2000 on the file of learned Additional Sessions Judge, Vellore, Vellore District.

For Appellant : Mr.V.Karthick for M/s. T.S. Gopalan and Co

For Respondent : Mr.N.R.Elango
Addl. Public Prosecutor

J U D G M E N T

(Delivered by P.D.DINAKARAN,J.)

The appellant/sole accused stands convicted in Sessions Case No.50 of 2003 on the file of the Additional Sessions Court, Vellore for an offence under section 302 IPC and sentenced to undergo life imprisonment and to pay a fine of Rs.5,000/-, in default, to undergo one year rigorous imprisonment for the murder of his brother's wife Neela on 17.9.1999 at 7.00 p.m. by cutting her with knife.

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2. The story of the prosecution is as follows:

2.1. The accused/appellant is the elder brother of P.W.1. The deceased is the wife of P.W.1. There was a pathway dispute between the accused and P.W.1. Eight days prior to the occurrence, there was a quarrel between the accused and the son of P.W.1 by name Senthil Kumar, in the matter of fencing the field. In the melee, Senthil Kumar inflicted cut injuries on the left wrist of the accused. A complaint was lodged by the accused against the said Senthil Kumar which was registered in Crime No.523 of 1999 on the file of the respondent. The printed FIR is marked as Ex.P9.

2.2. On the date of occurrence, viz. 17.9.1999, at about 7.00 pm, when the deceased was returning after grazing the cattle along with her son P.W.2, the accused cut the deceased on her neck and head and ran away. Immediately, P.W.2 rushed to the village Athiyur Kollakottai and informed his sister, P.W.5, brother Mathappan and villagers. P.W.3, son-in-law of the uncle of the deceased, P.W.4 cousin brother of the deceased and other villagers went to the place of occurrence and took the deceased to the Tirupattur Government Hospital in an autorickshaw. P.W.2 went to the hospital in the cycle of one Boopathi.

2.3. At about 8.00 pm, they reached the hospital, where the deceased was declared brought dead by P.W.7, Doctor, who issued Ex.P6 Accident Register Extract and also sent death intimation to the Police Station.

2.4. P.W.1, on returning from his masonry work, informed by his son Senthil Kumar about the occurrence, rushed to the hospital.

2.5. P.W.13, Sub Inspector of Police, on receipt of death intimation, went to the Tirupattur Government Hospital and obtained the statement of P.W.1, Ex.P1 and registered a case in Crime No.527 of 1999 under Section 302, IPC. Ex.P16 is the printed FIR. He forwarded the FIR to the Judicial Magistrate concerned and other Police officials through P.W.11, Head Constable.

2.6. P.W.14, Inspector of Police took up the investigation at 10.30 pm. He went to the scene of occurrence. As it was very late, he started his investigation on the next day at 6.00 am. He prepared Observation Mahazar, Ex.P2 and rough sketch Ex.P17. He recovered bloodstained earth M.O.5 and sample earth M.O.6 under Mahazar, Ex.P3. Thereafter, he conducted inquest

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over the dead body in the presence of Panchayatdars. Ex.P18 is the inquest report. He sent requisition for conducting postmortem through P.W.12, Head Constable.

2.7. On the basis of Ex.P7, requisition to conduct postmortem, P.W.8, Doctor conducted post mortem and found the following injuries:

External Injuries:

1. Vertical cut injury of 6 x 2 x 2 cm bone deep seen over vertex outer diploe cut.

2. Horizontal cut injury of 10 x 3 x 2 cm bone deep over top of occiput outer diploe cut.

3. Cut injury over Right parietal area of 10 x 2 x 2 cm bone cut.

4. Cut injury of 8 x 3 x 2 cm over occiput outer diploe cut.

5. Deep cut penetrating wound of 4 x 2 x 5 cm seen over right side of neck below right angle of jaw.

6. Small punctured wound of 0.5 cm size above left eye brow.

7. Laceration 2 x 1 cm over right thigh.

On Dissection:

Skull: (1) cut diploe front cut beneath wounds (1) and (4). Loose bony 10 x 3 cm flap seen beneath 2 & 4 wounds. Brain exposed beneath the flap. About 50 ml of blood (fifty) seen in posterior fossa. Neck: Only muscles found cut beneath wound (3). Blood vessels intact. Hyoid intact. No fracture. Thorax: No fracture of ribs. Heart & lungs intact. Abdomen: Stomach contains raghi (kalli) Uterus: Overies empty other visceral organs exposed. External Genitalia – NAD spine & limbs. No fracture. Five ml of blood taken from heart & preserved for analysis.

Ex.P8 is the post mortem certificate issued by P.W.8 doctor opining that the deceased would appear to have died of shock and haemorrhage due to skull injury about 18 + 2 hours prior to post mortem.

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2.8. P.W.14 arrested the accused at 5.00 pm on 18.9.1999 in the presence of P.W.6, Village Administrative Officer and obtained his confession statement, admissible portion of which is marked as Ex.P4. Based on Ex.P4, he seized the knife, M.O.4 under Mahazar Ex.P5. He sent the accused to the Court for judicial custody.

2.9. P.W.14 after post mortem, seized the dress materials (M.Os.1, 2 and 7) and metti (M.O.3 series) worn by the deceased under Form-95, Ex.P15. He sent a requisition Ex.P10 to the Court to subject the material objects for chemical analysis. Ex.P12 is the Biological report. Ex.P13 is the Serology report. Ex.P14 is the Chemical Analysis report.

2.10. P.W.14 examined the witnesses and recorded their statements and after completing the investigation, he filed a final report against the accused under Section 302 IPC on 10.11.1999.

2.11. Since the accused denied the charge framed, he was tried by the trial Court in S.C.No.175 of 2000.

2.12. The prosecution, in support of their case and to substantiate the charge levelled against the accused,

examined P.Ws.1 to 14 and marked Exs.P1 to P18 and M.Os.1 to 7.

3. When the accused was questioned under Section 313 Cr.P.C. with regard to the incriminating circumstances appearing against him in the evidence of prosecution witnesses, he denied the same as false. The accused neither examined any witness, nor marked any document.

4. The trial Court, appreciating the evidence on record, both oral and documentary, convicted and sentenced the accused as stated earlier. Exasperated by the judgment of conviction and sentence, the accused has preferred this appeal.

5.1. The learned counsel appearing for the appellant contends that even though Ex.P1, statement of P.W.1, speaks about the motive behind the crime and the occurrence, the prosecution case rests on the evidence of the eye-witness, P.W.2, who was ten years old at the time of occurrence and P.W.2 being child witness, cannot be believed as his presence in the scene of occurrence itself is doubtful and it may not be safe to convict the accused on the basis of the evidence of P.W.2.

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5.2. Inviting our attention to the evidence of P.W.2 that the deceased was taken to the house immediately after the occurrence and thereafter, taken to the hospital, whereas the evidence of P.Ws.3 and 4 is to the effect that from the scene of occurrence, they took the deceased to the hospital in an autorickshaw, learned counsel for the accused contends that the above contradiction would lead to an inference that P.W.2 would not have been present in the scene of occurrence and it would be fatal to the case of prosecution.

5.3. Learned counsel further contends that the evidence of P.W.2 that the accused inflicted cut injuries on the head and neck of the deceased is not corroborated by Ex.P8, post mortem certificate, wherein it is found that the deceased sustained a lacerated injury on thigh and thus, the evidence of P.W.2 as eye-witness would not be trustworthy.

5.4. Referring to Ex.P6, Accident Register Extract, the learned counsel contends that P.W.7, the Doctor, apart from writing the name of P.W.3 as the person who brought the deceased to the hospital, also recorded the statement of P.W.2 about the accused and the occurrence, which could not be possible, as P.Ws.3 and 4 took the deceased to the hospital by an autorickshaw and P.W.2 went to the hospital in the cycle of one Boopathi and P.W.7 is not expected to record statement in Ex.P6, as per Paragraph 622 of Section 10 of the Madras Medical Code (Vol.I).

5.5. Moreover, when P.W.2 stated in his evidence that the dress worn by him was containing bloodstains, according to the learned counsel, failure on the part of the investigating officer in collecting and subjecting the same for chemical analysis, particularly when the weapon used for commission of offence, M.O.4 does not contain human blood, vitiates the case of the prosecution.

5.6. Drawing our attention to the evidence of P.W.8, post mortem Doctor that the abdomen contained undigested food, learned counsel contends that the occurrence would not have taken place at 7.00 pm as stated by P.W.2, since the village people used to take food in the early evening and if that be so, the occurrence would have taken place much earlier and not at 7.00 p.m., as stated by P.W.2 and hence, the evidence of P.W.2 would not come to the aid of the prosecution.

5.7. Learned counsel also contends that in any event, the motive has not been clearly established, as the prior enmity is only between the accused and Senthil Kumar and not between the accused and the deceased and therefore, the foundation of the prosecution case has not been laid properly.

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6.1. Per contra, learned Additional Public Prosecutor submits that when the evidence of P.W.2 is corroborated by the evidence of P.Ws.3 and 4, the same cannot be doubted on the ground that P.W.2 is a child witness.

6.2. He further submits that though P.Ws.2 and 5, who are the son and daughter of the deceased stated that they took the deceased to the house and thereafter to the hospital, P.Ws.3 and 4 had stated that they took the deceased to the hospital from the place of occurrence and the evidence of P.Ws.2 and 5 with respect to the occurrence have to be considered in the light of Section 6 of the Evidence Act.

6.3. When the evidence of P.W.2 with regard to the injuries inflicted on the head of the deceased is corroborated by Ex.P8, post mortem certificate, for want of corroboration with respect to the injury inflicted on the thigh, according to the learned Additional Public Prosecutor, the evidence of P.W.2 cannot be said to be unworthy of acceptance.

6.4. As the statement given by P.W.2 to the Doctor, which is recorded in Ex.P6, corroborates with the evidence of P.W.2, learned Additional Public Prosecutor submits that the same cannot be lightly disregarded merely on the ground that as per paragraph 622 of Section 10 of the Madras Medical Code (Vol.I), the Doctor is not expected to record any statement. According to him, P.W.2 could have reached the hospital at the time of examination of the deceased by P.W.7, since he went to the hospital in the cycle of one Boopathi, while P.Ws.3 and 4 took the deceased to the hospital in an autorickshaw.

6.5. Accepting the contention of the learned counsel for the appellant that there was a failure on the part of the investigating officer in not collecting the blood stained dress worn by P.W.2, learned Additional Public Prosecutor contends that the above minor defect in the prosecution case would not be fatal to the prosecution case as the prosecution has proved the guilt of the accused through the evidence of P.W.2 which is corroborated by P.Ws.3 and 4 and the medical evidence of P.W.7.

6.6. Learned Additional Public Prosecutor submits that the abdomen of the deceased contained undigested food, as per Ex.P8, post mortem certificate, but the same cannot create a doubt about the authenticity of the evidence of P.W.2 with regard to the time of occurrence, inasmuch as the learned counsel for the appellant himself contends that the village people used to take food in the early evening and therefore, the same would not have got digested.

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6.7. He further contends that the evidence of P.Ws.1 and 2 would clearly prove the motive behind the occurrence and therefore, the contention that there is no prior enmity between the accused and the deceased and accordingly, the occurrence, as spoken to by P.W.2, would not have taken place at 7.00 pm, will not support the defence.

7. We have given our anxious consideration to the submissions of both sides and perused the materials available on record.

8. To prove the occurrence, since the prosecution rests its case on the evidence of P.W.2, the child witness, the veracity of which is mainly questioned by the learned counsel for the appellant, let us consider the evidence of P.W.2 first. It is a settled law that the testimony of child witness needs to be carefully evaluated and must find adequate corroboration before it could be relied upon. The Apex Court in State of Rajasthan v. Om Prakash ((2002) 5 SCC 745) held,

> "that the evidence of a child witness is required to be evaluated carefully as the child may be swayed by what others may tell him or her as the child is an easy prey to tutoring. Wisdom requires that the evidence of a child witness must find adequate corroboration before it is relied on."

Therefore, the Court should seek corroboration from other evidence to testimony of child witness. The Apex Court in Bhagwan Singh v. State of M.P. ((2003) 3 SCC 21) also held as under:

> "The law recognizes a child as a competent witness but a child particularly at such a tender age of six years, who is unable to form a proper opinion about the nature of the incident because of immaturity of understanding, is not considered by the court to be a witness whose sole testimony can be relied upon without other corroborative evidence. The evidence of a child is required to be evaluated carefully because he is an easy prey to tutoring. Therefore, always the court looks for adequate corroboration from other evidence to his testimony."

Accordingly, the child witness is reliable provided the same is corroborated by other witnesses.

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9. In the instant case, P.W.2, a boy of ten years old, stated in his evidence that himself and his deceased mother were returning home after grazing the cattle, the accused cut the deceased on her neck and head and ran away and he went to the Athiyur Kollakottai Village and informed his sister, P.W.5, brother Mathappan and villagers, including P.Ws.3 and 4. The evidence of P.Ws.3 and 4 support the evidence of P.W.2 who have stated that P.W.2 came to the village and informed that the accused cut his deceased mother. Similarly, P.W.5 also stated that she was informed about the occurrence by P.W.2. In the light of the principle settled in the above decisions, when the evidence of P.W.2 is corroborated with the evidence of P.Ws.3, 4 and 5, we have no doubt about the presence of P.W.2 at the time of occurrence and his evidence cannot be disbelieved merely on the ground that it is child witness.

10. Further, section 6 of the Evidence Act, 1872 and Illustration (a) thereunder, which will come into aid read as under:

> "6. Relevancy of facts forming part of same transaction-- Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant whether they occurred at the same time and place or at different times and places.
> Illustration (a): A is accused of the murder of B by beating him. Whatever was said or done by A or by B or the bystanders at the beating, or so shortly before or after it as to form part of transaction is a relevant fact."

11. In the light of section 6 of the Evidence Act, the facts which are connected with a fact in issue forming part of the same transaction are relevant to be considered. In the instant case, the evidence of P.Ws.3 to 5 are contemporaneous who have categorically stated that P.W.2 informed them that the accused cut the deceased. Considering the evidence of P.W.2, as corroborated by P.Ws.3 to 5 in the light of section 6 of Evidence Act, we have to hold that the evidence of P.W.2 cannot be disbelieved.

12. In the present case, the deceased was done to death when she was returning home after grazing cattle on 17.9.1999 at about 7.00 p.m. P.W.7 doctor who examined the deceased on 17.9.1999 at 8.00 p.m., declared the deceased brought dead. She found injuries on the head and neck. P.W.8 doctor, who conducted

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autopsy, found as many as seven injuries and most of them are cut injuries on the head. P.W.8 opined that the deceased would appear to have died of shock and haemorrhage due to skull injuries. The medical evidence of P.W.8 coupled with Ex.P8 postmortem certificate proves that the deceased was done to death in a brutal manner.

13. Regarding motive, the prosecution relies on the evidence of P.Ws.1 and 5. P.W.1 is the husband of the deceased and brother of the accused. He has stated in his evidence that there was a dispute with regard to pathway in between the lands of the deceased and the accused and when he put up fence, the accused questioned the same. From the evidence of P.W.1 it is seen that about eight days prior to the date of occurrence, there was a quarrel between the accused and his son Senthil Kumar for which the accused gave a complaint to the police against Senthil Kumar. P.W.1 in his cross has stated that for the last eight days prior to the date of occurrence there was a dispute with the accused regarding pathway. P.W.5, the daughter of deceased in her evidence has stated that her father put up fence in his land for which there was a dispute between her father and the accused. P.W.9 Sub Inspector of Police speaks about the complaint given by the accused with respect to the earlier incident on the basis of which a case in crime No.523 of 1999 was registered against Senthil Kumar, son of P.W.1. Therefore it is evident from P.Ws.1, 5 and 9 that there was a dispute with regard to pathway between the accused and the deceased family.

14. With regard to the contention raised by the learned counsel for the accused that the motive has not been clearly established, as the prior enmity is only between the accused and Senthil Kumar and not between the accused and the deceased, it is true that there was a quarrel between the accused and Senthil Kumar, son of the deceased about eight days prior to the occurrence and a case was also registered. P.Ws.1 and 9 speak about the same. But, it is deducible from the evidence of prosecution witnesses, the dispute between the accused and the deceased family was regarding pathway and it was not a private dispute between the accused and Senthil Kumar. In such circumstances, the above defence would not be helpful to the accused, as the prosecution has proved beyond reasonable doubt as the dispute was regarding pathway and further, it is not possible for the prosecution to unravel the full dimension of the mental disposition of offender towards the person whom he offended and the motive is the emotion which impels man to do a particular act.

15. What we have to see next is whether it is the accused who has committed the crime. The prosecution mainly relies on the evidence of P.W.2 son of the deceased who is said to have

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accompanied the deceased at the time of occurrence. The evidence of P.W.2 is clear and cogent and he has stated that the accused cut the deceased on her head and neck. His evidence is supported by the contemporaneous evidence of P.Ws.3 and 4. As discussed earlier, in the light of section 6 of Evidence Act, the evidence of P.W.2, as corroborated by P.Ws.3 and 4, is to be believed. Hence, we hold that the prosecution has proved that it is the accused who committed the crime. When the presence of P.W.2 in the scene of occurrence stands proved and the testimony of P.W.2 is cogent and trustworthy, we hold that though Ex.P1 was recorded from P.W.1, the ocular testimony of P.W.2 can be believed and the contention of learned counsel in this regard is rejected.

16. Coming to other contentions of learned counsel for the accused, P.Ws.2 and 5 stated in their evidence that the deceased, immediately after the occurrence, was taken to the house and thereafter to the hospital in an autorickshaw. But, P.Ws.3 and 4 stated that the deceased was taken to the hospital straight away from the scene of occurrence. The minor contradiction in the above statements would not weigh much importance, when the occurrence has been proved by the prosecution by ocular testimony of P.W.2 and the contention of learned counsel for the accused in this regard is rejected.

17. With respect to the overt acts, P.W.2 stated that the accused cut the deceased on both sides of her neck and head. It is true that P.W.8 doctor has noticed one injury on the thigh of the deceased, apart from six cut injuries on the head and neck. P.W.8, however, opined that the injuries on the head of the deceased caused the death. Therefore, merely because P.W.2 has not spoken to about the injury on the thigh of the deceased, particularly when the injuries found on the head and neck are found corroborated by the medical evidence, there is no necessity to disbelieve the evidence of P.W.2 and the submission of the learned counsel in this regard is also rejected.

18. As per the evidence of P.W.2, the deceased was taken to the hospital by P.Ws.3 and 4 in an autorickshaw and he went to the hospital in the cycle of one Boopathi. It is quite natural that immediately after the deceased was taken to the hospital, P.W.7 would have been informed and thereafter, she would have attended the deceased. By the time P.W.7 attended the deceased, P.W.2 would have reached the hospital in the cycle, since the distance between the place of occurrence and the hospital is only three furlongs, and given the statement that the accused cut the deceased on her neck and head. Hence, we do not see any reason to doubt the presence of the P.W.2 at the time of recording Ex.P6.

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19. The Madras Medical Code (Vol.I) Section 10 paragraph-622 gives guidelines or instructions to the doctor as to how the columns in wound certificate are to be filled up. Para-622 (vi) reads:

> "Medical officer should ascertain and incorporate in the certificate only the alleged cause as to the manner in which the injuries were inflicted, the weapon used and the time."

The Medical Officer should ascertain the cause of the injury, weapon used, time, etc. thereby showing no power is vested upon the Medical Officer, to ascertain from the injured or the person accompanied the injured, who is the cause for the assault, whether it is known or unknown even. The doctor is concerned, to ascertain and incorporate in the certificate, how the injuries were inflicted and what is the weapon used, including the time, so as to find out, at later point of time, whether the injury would have been caused by the weapon produced on behalf of the prosecution said to have been used by the assailants on the basis of the recovery, if any. In this view, if the doctor had incorporated about the statement made by the person who brought the deceased, that can be ignored, which appears to be the dictum of the Apex Court also in Basheer v. State 1993 (Crl.L.J. 2173). Even though the doctor P.W.7 is not expected to record such statement of P.W.2 about the accused and the occurrence, the evidence of P.W.7 proves that she examined the deceased and found injuries on her head and neck. Further, it is a procedural irregularity and the accused cannot seek aid of the same when his guilt has been proved by ocular testimony of P.W.2.

20. Though there was a failure on the part of the investigating officer to collect the bloodstained dresses worn by P.W.2 in order to subject the same for chemical analysis, the same would not shake the foundation of the prosecution case, as Exs.P12 and P13, Biology and Serology reports, would prove that the material objects which were seized and sent for chemical analysis contained human blood. Moreover, in our considered opinion, it is not necessary as the case of the prosecution is not based on circumstantial evidence, but based on eye witness, P.W.2.

21. Similarly, Ex.P8, post mortem certificate would state that the abdomen contained undigested food. But, it is not permissible for the learned counsel appearing for the accused to contend that the occurrence should have taken place much earlier and not as spoken to by P.W.2. As rightly pointed out by the learned Additional Public Prosecutor, the villagers used to take food in the late evening. If that be so, there would have been

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every possibility of the abdomen being contained with undigested food at the time of occurrence at 7.00 p.m., as stated by P.W.2.

In the result, the appeal stands dismissed and the conviction and sentence of the accused are confirmed.

kpl

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Additional Sessions Judge
Vellore

2. - do - Thro The Principal Sessions Judge
Vellore

3. The District Collector, Vellore

4. The Director of General of POlice, Chennai

5. The Superintendent, Central Prison Vellore

6.The Public Prosecutor,
Chennai.

7.Sub Inspector of Police,
Thiruppathur Taluk Police Station
Vellore District

+ one cc to Mr. T.S. Gopalan, Advocate sr no. 49392

AKM(CO)
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